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No. 765

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WILSON & CO., INC., SWIFT & COMPANY, AND ARMOUR AND COMPANY,

Petitioners,

vs.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, BELL SYSTEM ASSOCIATED COMPANIES, AND WESTERN UNION TELEGRAPH COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS IN REPLY TO BRIEFS IN OPPOSITION.

CHARLES A. BANE,
ARTHUR C. GEHR,
ROBERT A. HELMAN,
SHARON L. KING,
KENNETH K. HOWELL,
JAMES E. KNOX, JR.,
72 West Adams Street,
Chicago, Illinois 60603,
Counsel for Petitioners.

ISHAM, LINCOLN & BEALE,
Of Counsel.

THE DARNELL-GIBBON PRINTING COMPANY, CHICAGO

CITATIONS.

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The petition for certiorari presents two questions: (1) Whether staff counsel prosecuting a rate case are prohibited from making *ex parte* presentations in that proceeding. (2) Whether notice must be given of the issues in a rate proceeding. The court below expressly

answered both of these questions in the negative.[1] The Government and Western Union Telegraph Company have filed briefs opposing review by this Court of these holdings.[2]

Neither respondent denies the fundamental and reoccurring nature of the questions presented.[3] They merely attempt to construe narrowly the cases which were cited by petitioners to show a conflict.

Aside from its defensive constructions of the holdings in *Morgan* v. *United States*, 304 U. S. 1 (1938) ("*Morgan* II"), and *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (D. C. Cir. 1959), the Government does not purport to defend, either as a matter of policy or precedent, *ex parte* participation by staff counsel prosecuting a rate proceeding. The argument of Western Union in support of such participation is based on the erroneous assumption that the prohibition against *ex parte* participation by agency prosecutors would apply to all staff members

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1. The court below expressly rejected respondents' contentions that proper procedural steps were not taken to preserve the questions presented here. (Petition, Appendix B, pages 27-28.) In accordance with decisions of this Court and of other Courts of Appeals, the court below held that the *ex parte* participation question was properly raised after the close of the Commission proceeding because petitioners did not have notice prior thereto that such *ex parte* participation might occur. In accordance with the decision in *Hennesey* v. *S. E. C.*, 285 F.2d 511 (3d Cir. 1961), the court below held that it was not necessary for petitioners to raise before the Commission the sufficiency of the notice when that question had been raised before the Commission by other ratepayers.

2. The other named respondents, American Telephone and Telegraph Company and Bell System Associated Companies, have not opposed the grant of certiorari.

3. Lest undue deference be shown for an administrative proceeding which was needlessly stretched over eight years, it should be noted that the Commission recently has concluded that the rates established in this proceeding are based upon antiquated cost evidence and are out line with the rates for similar services furnished by American Telephone and Telegraph Company. *In re American Tel. & Tel. Co.*, Docket No. 14251, Memorandum Opinion and Order issued December 24, 1964.

without regard to whether they participate in the hearing before the Commission.

The Administrative Conference of the United States has condemned *ex parte* participation by staff counsel prosecuting a rate proceeding. (Petition, pages 12-13.) The commentators on administrative law believe this Court has prohibited such *ex parte* participation. (Petition, page 11.) To the extent the regulatory agencies may have doubts respecting *Morgan* II and *Sangamon*, this case presents this Court with a clear opportunity to dispel such doubts.

This Court in *Morgan* II held that a rate proceeding is governed by "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature" and that these requirements have not been met when staff counsel prosecuting the case are permitted to mak presentations "without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them." 304 U. S. 1, 18-22 (1938).

Respondents argue that *Morgan* II merely says that interested parties must be afforded the opportunity to respond to the action the Agency proposes to take before that action becomes final. This argument stems from the obviously fallacious assumption that the "opposing party" whose claims the interested parties must have a reasonable opportunity to know and meet is the Agency itself, not the agency prosecutors. This is just not so. In addition to the clear language of this Court's statement of the principle it was propounding and the obvious inappropriateness of such a characterization of the tribunal, this Court expressly labeled the agency prosecutors as the "opposing party" to which it was referring.[4]

4. "In all substantial respects, the Government acting through the Bureau of Animal Industry of the Department was prosecuting the proceeding against the owners of the market agencies. The

Contrary to the Government's assertion, this Court did not in the subsequent *Morgan* decisions (III & IV) "approve," either expressly or by implication, the Government's present interpretation of *Morgan* II by permitting the use of the findings originally prepared and presented *ex parte* by the agency prosecutors as an initial decision in the reopened rate proceeding. In *Morgan* III, 307 U. S. 183 (1939), the only question before the Court was "the proper disposition to be made of a fund paid into the court below" during the litigation in *Morgan* I & II. 307 U. S., at 185. This Court's mere recitation of the fact that in the reopened rate proceeding still pending before the Secretary the original findings had been served as tentative findings to which the interested parties could take exception was not an approval of that procedure. 307 U. S., at 187. By the time the reopened rate proceeding was actually brought before this Court for review in *Morgan* IV, 313 U. S. 409 (1941), the Secretary in response to the protest of the interested parties had relented from his plan to use the original findings as tentative findings and had instead held a new evidentiary hearing using the original findings merely as proposed findings to define the issues. 313 U. S., at 415-16.

Once the explicit holding of *Morgan* II is recognized, *i.e.*, interested parties must be afforded a reasonable opportunity to know and meet any presentations by staff counsel prosecuting a rate proceeding, it is clear that this holding is not honored by the procedure which occurred here and which the Commission apparently intends to persist in following. None of the interested parties nor even the Solicitor General knows what factual contentions and arguments the agency prosecutors advocated in their *ex parte* presentations to persuade the Commission to adopt the nu-

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proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other." 304 U. S., at 20.

merous findings in the initial decision, final decision, and order denying reconsideration. (Petition, Appendix D, pages 44-45.) In the case of the final decision and the order denying reconsideration, the interested parties were not even permitted to take exception to that unknown portion of the *ex parte* presentation which was incorporated in the findings supporting these actions.

Sangamon Valley Television Corp. v. *United States*, 269 F. 2d 221 (D. C. Cir. 1959), recognizes the obvious fact that the prohibition against *ex parte* participation applied in *Morgan* II is not dependent on the arbitrary classification between "rule making" and "adjudication" drawn by the Administrative Procedure Act of 1946, which intervened between the two decisions.[5] Both the Government and Western Union attempt to distinguish *Sangamon* on the ground that the *ex parte* participation condemned in that case was by a private party. No authority is offered to support this distinction.

The meaningful criterion is not the motive of the *ex parte* participator but whether he "has buried himself in one side of an issue [so that he] is disabled from bringing to . . . [the] decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions." Final Report of Attorney General's Committee on Administrative Procedure, S. Doc.

5. The Government in its discussion of the dichotomy between "rule making" and "adjudication" drawn by the Administrative Procedure Act suggests (note 6 on page 6) that this Court has characterized ratemaking as the former. This Court has never passed on the question of whether ratemaking is "rule making" or "adjudication." The decisions cited by the Government all preceded the enactment of the Administrative Procedure Act of 1946; and, while they characterize the result of a rate proceeding as quasi-legislative, these cases, and others like them, hold that for the purpose of determining the procedure to be observed a rate proceeding is to be treated as quasi-judicial. See also discussion from *Morgan* I, 298 U. S. 468, 480 (1936), which is set out on page 9 of the Petition.

No. 8, 77th Cong., 1st Sess. 55-57 (1941). That staff counsel prosecuting a rate case have so buried themselves was decided in *Morgan* II. As recognized by the statutory prohibitions of the Administrative Procedure Act and the Communications Act,[6] *ex parte* participation in certain types of proceedings is improper whether such participation is by a private party or an agency party. The holdings in *Morgan* II and *Sangamon* are that the proceedings in which this is true are not confined to those enumerated in the Administrative Procedure Act and the Communications Act.

The distinction between private and staff parties which respondents attempt to draw would not not make proper the procedure followed below. As parties to the proceeding, the agency prosecutors conferred off the record with the carriers and some of the other interested parties to the proceeding. (*E.g.*, A. 1323-36.) If the agency prosecutors are to be considered the alter ego of the Commission, then here is the *ex parte* presentation by private parties which even respondents admit is condemned by *Sangamon*.

Western Union argues that the constitutional protection against *ex parte* participation recognized in *Morgan* II and *Sangamon* is not available to ratepayers. It appears to be sufficient answer to this startling proposition for which no authority is cited to point out that the Government carefully has refrained from joining Western Union in this contention. The statutory and constitutional rights of ratepayers to a fair proceeding, particularly where as here the outcome determines the disposition of a substantial fund of money which has been accumulating pending the

6. Administrative Procedure Act § 5(c), 60 Stat. 239 (1946), 5 U. S. C. § 1004(c); Communications Act § 409(c), 66 Stat. 721 (1952), as amended, 47 U. S. C. § 409(c) (Supp. V, 1959-63).

proceeding, would seem unquestionable.[7] Moreover, as parties aggrieved by the Commission's action, petitioners are entitled by statute to raise on review of that decision "any relevant question of law in respect of the order of the Commission." *Federal Communications Comm'n* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 477 (1940).

Respondents' arguments that the Commission is not required to give notice of the issues involved and that the decision below in this regard is not in conflict with *Hill* v. *Federal Power Comm'n*, 335 F.2d 355 (5th Cir. 1964), are adequately refuted in the Petition, pages 13-18. They cite no authority for ignoring the clear requirement of the Administrative Procedure Act, as shown by its language and legislative history, that notice of the issues involved be published.[8]

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7. The statutory requirement of "full opportunity for hearing" imposed by the Communications Act, § 205(a), 48 Stat. 1072 (1934), 47 U. S. C. § 205(a), must be interpreted in light of *Morgan* II, 304 U. S. 1, 14-15, 19 (1938), as incorporating "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." This requirement was not undercut by the subsequent enactment of the Administrative Procedure Act and the even later incorporation of certain of the provisions of that Act into the Communications Act. The Administrative Procedure Act of 1946 specifically provides that it does not "limit or repeal additional requirements imposed by statute." Section 12, 60 Stat. 244 (1946), 5 U. S. C. § 1011. In 1952 certain of the prohibitions imposed by the Administrative Procedure Act were strengthened and incorporated into the Communications Act for the avowed purpose of imposing more stringent procedural safeguards in the proceedings before the Federal Communications Commission than were imposed by the Administrative Procedure Act in general. Legislative History of the 1952 Amendments to the Communications Act, H. R. No. 1750, 82d Cong., 2d Sess. 18-20 (1952).

The cases establishing petitioners' rights to challenge the fairness of the proceeding below as a constitutional matter are collected in *Barrows* v. *Jackson*, 346 U. S. 249, 255-58 (1953).

8. The authorities cited by the Government on page 11 of its brief either do not bear on the question of whether the Administrative Procedure Act requires notice of the issues to be published or actually support petitioners' contention that the Administrative

The argument by Western Union that ratepayers, as opposed to carriers, are not entitled to any notice at all is clearly erroneous. The Government does not endorse this contention. The practice of this Commission and the other federal rate agencies is to publish notice even though the carriers have been given notice. Inasmuch as the authorities uniformly recognize the right of ratepayers to participate as parties in a rate proceeding and to seek review of the action taken in that proceeding,[9] it is incredulous that ratepayers are not entitled to any notice of the proceeding.

For the reasons set out in their petition for certiorari, which reasons, as shown above, have not been refuted by respondents, petitioners, renew their request that this Court issue a writ of certiorari to review the decision below.

Respectfully submitted,

CHARLES A. BANE,
ARTHUR C. GEHR,
ROBERT A. HELMAN,
SHARON L. KING,
KENNETH K. HOWELL,
JAMES E. KNOX, JR.,
72 West Adams Street,
Chicago, Illinois 60603,
Counsel for Petitioners.

ISHAM, LINCOLN & BEALE,
Of Counsel.

Procedure Act imposes such a requirement. *Tagg Bros.* v. *United States*, 280 U. S. 420, 440 (1930), not only is inapposite in its reasoning, but preceded the Administrative Procedure Act, which was enacted to remove some of the previous abuses in the administrative processes.

9. *E.g.*, *American Communications Ass'n* v. *United States*, 298 F.2d 648 (2d Cir. 1962); *National Coal Ass'n* v. *Federal Power Comm'n*, 191 F.2d 462 (D. C. Cir. 1951); *Public Serv. Comm'n* v. *Federal Power Comm'n*, 257 F.2d 717 (3d Cir. 1958), *aff'd*, 360 U. S. 378 (1959).